The contrary result was reached in a recent Kentucky case in which a mandamus was issued to compel the governor to sign treasury warrants. *Cochran* v. *Beckham* (1905) 89 S. W. 262. The first judicial expression of this view, *State* v. *Chase* (1856) 5 Ohio St. 528, was based upon the unwarranted extension of a dictum of Chief Justice Marshall, that "it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus is to be determined." *Marbury* v. *Madison* (1803) 1 Cranch 137, 170. Later cases have added to this the ground that a refusal to issue mandamus would place the governor "above the law", *Magruder* v. *Swann* (1866) 25 Md. 173, and deny a remedy to a violated right. *Cotten* v. *Ellis* (N. C. 1860) 7 Jones 545, a position that must depend upon the narrow theory that all law is judicial process and all remedies are to be found in courts of law. Upon such reasoning has been developed the doctrine, later repudiated in certain jurisdictions, *Hovey* v. *State*, supra; *State* v. *Jelks* (1902) 138 Ala. 115, 121, that the writ should issue against a governor to compel the performance of a purely ministerial duty, i. e. one involving no discretion. *Tennessee &c. R. R. Co.* v. *Moore* (1860) 36 Ala. 371; *Gray* v. *Coghlen* (1880) 72 Ind. 567; *Martin* v. *Ingraham* (1888) 38 Kan. 641. Since the remedy will never be used to interfere with discretionary powers, *U. S.* v. *Seaman* (1854) 17 How. 225; *Cassidy* v. *Young* (1891) 92 Ky. 227, such a doctrine makes out no stronger case against the governor than against any minor official, and fails altogether if, as suggested in *State* v. *The Governor* (N. J. 1856) 1 Dutch. 331, 351, "ministerial" properly means something done under superior authority, or if, as laid down in *People ex rel. Sutherland* v. *Governor*, supra, every duty put into the hands of the governor is presumed to involve discretion. *Hawkins* v. *Governor* (1839) 1 Ark. 570, 586. In any case, under the rule that mandamus will not issue where it would be ineffectual, High, Ex. Legal Rem. § 14; *County Comm'rs* v. *City of Jacksonville* (1895) 36 Fla. 196, it is difficult to justify its use against the chief executive, who is not subject to judicial process, *State of Mississippi* v. *Johnson*, supra, and who cannot be forced to obey. *People ex rel. Broderick* v. *Morton* (1898) 156 N. Y. 136, 145. There is little to support a doctrine that, for the ineffectual assertion of a narrow principle, obscures the theory of co-ordination in the division of governmental powers. *Mauran* v. *Smith* (1865) 8 R. I. 192.

RIGHTS OF PARENTS TO CUSTODY OF CHILDREN.—A determination of the nature and extent of the rights of parents to the custody of their children has become of vital importance with the widespread establishment of juvenile courts possessing broad discretionary powers to commit large classes of children to State institutions upon the ground that the welfare of the child demands an assumption by the State of parental control, *Commonwealth* v. *Fisher* (Pa. 1905) 62 At. 198; *Ex parte Loving* (1903) 178 Mo. 194; *In re Benson* (Utah 1906) 62 Cent. L. J. 219; see *Hunt* v. *Judges* (Mich. 1905)

105 N. W. 531, and not as an exercise of criminal jurisdiction for the protection of society, *People* v. *Masten* (N. Y. 1894) 79 Hun 580; cf. *State* v. *Ray* (1885) 63 N. H. 406. While the laws of nature and society may demand that parents have custody, these natural and social rights are subject to the municipal laws and may be enlarged or restrained, unless the legislative power is limited by some constitutional prohibition. *U. S.* v. *Bainbridge* (1816) 1 Mason 71; *State* v. *Clottu* (1870) 33 Ind. 409. In a recent decision the Supreme Court of Illinois held that a father, who had been and was still ready to render all the duties of a parent, could not be deprived of the custody of his son upon the sole ground of the son's delinquency, evidence of which was the commission of indecent assaults. *People* v. *McLain* (Ill. 1905) 38 Chi. Leg. N. 166. The legislative power thus to infringe upon parental rights was denied upon the ground that the constitutional guaranty of a right to the pursuit of happiness forbids that a parent should be unreasonably deprived of the custody, association and society of his child, citing Black, Cons Law, § 204, and that the constitution protects the property right of the parent to the services of his son from destruction without due process of law. By the common law the father has an undoubted right to the custody of his children during infancy, Eversley, Dom. Rel. 493; *People* v. *Olmstead* (N. Y. 1857) 27 Barb. 9, though it is not allowed to prevail in cases where the parent is proved to be unfit either as regards the physical or moral welfare of the child. *Wellesley* v. *Wellesley* (1828) 2 Bligh N. S. 124; Story, Eq. Jur. § 1341. By the common law, also, a father is entitled to the services and earnings of his minor children while they live with him and are maintained by him. Reeves, Dom. Rel. 359; Schouler, Dom. Rel. § 252. This right is analogous to the property right of a master in the labor and services of a servant and is the basis of the parent's recovery for injuries to a child by the wrongful acts of others. *Hussey* v. *Ryan* (1885) 64 Md. 426; Burdick on Torts, 128. In pronouncing unconstitutional a statute which provided for commitment unjustifiably infringing the rights of parent and child, *People* v. *Turner* (1870) 55 Ill. 280, and later in upholding a similar statute curing these defects, *Ex parte Ferrier* (1882) 103 Ill. 367, the Illinois courts have clearly recognized these rights as protected under constitutional guarantees.

In opposition to this view, however, is the opinion that the custody of the parent is merely a privilege conferred upon the parent in the exercise of the police power. Tiedeman, Lim. of Police Power, § 166. It is undoubtedly true that the tendency of American courts has been to override all technical objections whereby custody is awarded irrespective of the true merits of the case. Hochheimer, Custody of Infants, § 22; *Bennett* v. *Bennett* (1860) 13 N. J. Eq. 114. But in these ordinary controversies for custody, where it is shown that there has been a failure, culpable or unfortunate, to give due regard to all parental duties, it is a just and reasonable doctrine which makes the

welfare and best interests of the child paramount to the claims of either parent. Schouler, Dom. Rel. § 248; Hurd, Habeas Corpus, 462–520. Moreover, from the very nature of such determinations there is a full hearing and the rights of all parties are squarely adjudicated. See Tyler, Infants and Coverture, § 187. A more closely analogous series of decisions is that upholding statutes which authorize a summary commitment to State institutions of homeless, dependent or neglected children, the courts expressly declaring however that the rights of parents are not bound by a commitment to which they are not parties, *Milwaukee Industrial School* v. *County* (1876) 40 Wis. 328; *Farnham* v. *Pierce* (Mass. 1886) 55 Am. Rep. 452, note, although after commitment the courts have refused to restore a child to a parent where the child's welfare is not to be secured thereby. *House of Refuge* v. *Ryan* (1881) 37 Oh. St. 197; *State* v. *Kilvington* (1898) 100 Tenn. 227. These inherent legal and natural rights of the parents, which have been recognized as underlying all phases of legal control over the custody of children, *In re Stittgen* (1901) 110 Wis. 625, 630, are merely afforded the protection of due process of law by the principal case in requiring that before a child can be taken from the parent's custody it must be shown that the parent is so unfit or inefficient that the welfare of the child demands an exercise of the State's parental control. The result seems in harmony with the nature of the proceedings in the juvenile court, cf. *In re Benson*, supra, and the tendency of the law to compel parents to perform, as far as possible, their duties to their children, the State displacing them only in extreme cases.

THE RIGHT OF A GOVERNOR TO SUE.—Prior to the appointment of the first regular attorney-general by Edward IV in the year 1462, Dugdale, Orig. Jur., Chronica Series, p. 67, the interests of the king were protected by attorneys specially appointed for the occasion. Id. pp. 19–65. While Coke says this officer's patent continues during good behaviour, it is evident from the form of the patent that the king is the sole and unrestrained arbiter of its continuation. Pulling on Attorneys, p. 18, *f.* Moreover, the Crown's interests, other than those of property, were frequently represented by other attorneys, as the King's Coroner and Attorney in the Court of King's Bench, 4 Bl. Com. 308, 309, the King's Premier Serjeant, the King's Ancient Serjeant and the King's Advocate General. See 5 Edw. III, c. 13 (5); *Attorney-general* v. *Norstedt* (1816) 3 Price 97, 108. It thus appears that the Attorney-general of England was in theory the crown's lawyer and subject to his principal, though he was the proper party to suits affecting the king's property interests, *Reeve* v. *Attorney-general* (1741) 2 Atk. 223; *Hovenden* v. *Lord Annesley* (1805) 2 Sch. & Lef. 607, and although, because of the general obsession of the Crown's power, his action is probably now never actually controlled by the king.

The attorneys-general of our various States, as the successors of the attorney-general of England, *People* v. *Miner* (N. Y. 1868) 2 Lans. 396, occupy an analogous position as the legal representa-